

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**D.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
White Pigeon, MI, Employer**

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**Docket No. 16-0244  
Issued: April 5, 2016**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 24, 2015 appellant, through counsel, filed a timely appeal from a June 26, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established that the August 28, 2013 loss of wage-earning capacity determination should be modified.

**FACTUAL HISTORY**

On November 29, 2006 appellant, then a 39-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 25, 2006 she sustained low back pain radiating into the right lower extremity in the performance of duty. OWCP accepted the claim and assigned file number xxxxxx336, for a temporary aggravation of nerve impingement due to a

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

disc extrusion and a temporary aggravation of a sequestered lumbar disc fragment. It determined that the conditions had resolved as of March 1, 2007.<sup>2</sup> Appellant stopped work on January 29, 2006 and returned to work on March 15, 2007 as a customer service supervisor.

OWCP previously accepted appellant's July 13, 2005 occupational disease claim for an aggravation of a lumbar disc extrusion and displacement of an intervertebral disc under file number xxxxxx990. It additionally accepted that she sustained an exacerbation of nerve impingement and a sequestered lumbar disc fragment on September 10, 2009, assigned file number xxxxxx834. OWCP combined all of appellant's claims under master file number xxxxxx990.

On March 22, 2012 appellant underwent a spinal fusion at L4-S1, authorized by OWCP under file number xxxxxx834. Following her surgery, on May 10, 2013 the employing establishment offered her a position as a complaint and inquiry clerk effective May 20, 2013. The position required sitting, standing, and talking for five hours a day, and driving for three hours per day. The offer indicated that the assignment started May 20, 2013 and ended September 29, 2013. Appellant accepted the position on May 23, 2013.

In a June 5, 2013 e-mail, the employing establishment advised OWCP that the complaint and inquiry clerk position beginning May 20, 2013 was an "open ended temporary detail, but may last indefinitely." In an August 15, 2013 telephone call, the employing establishment stated that appellant was doing very well in the position and that it was "available indefinitely...." In a telephone call dated August 26, 2013, the employing establishment related that the job was not temporary and was effectively an internal rehabilitation position with the goal for her to "compete for better jobs in the future."

By decision dated August 28, 2013, issued in file number xxxxxx834, OWCP reduced appellant's compensation to zero effective May 20, 2013 based on its determination that her actual earnings as a complaint and inquiry clerk fairly and reasonably represented her wage-earning capacity.

On October 3, 2014 appellant filed a claim for compensation (Form CA-7) requesting compensation for intermittent disability from September 20 to October 3, 2014 under file number xxxxxx336. On October 17 and November 3, 2014 she filed claims for compensation for intermittent disability from October 4 to 31, 2014.

By letter dated October 17, 2014, OWCP noted that, under combined file number xxxxxx834, it had issued an August 28, 2013 loss of wage-earning capacity determination based on appellant's work beginning May 20, 2013 as a complaint and inquiry clerk. It informed her of the evidence required to show that she sustained a recurrence of disability.

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<sup>2</sup> By decision dated January 18, 2007, OWCP denied appellant's claim after finding that the medical evidence was insufficient to show that she sustained a diagnosed condition as a result of the accepted work incident. On January 26, 2007 appellant requested an oral hearing before an OWCP hearing representative. Following a preliminary review, in a decision dated May 17, 2007, an OWCP hearing representative vacated the January 18, 2007 decision and remanded the case for OWCP to obtain additional information from appellant's attending physician.

In a decision dated November 18, 2014, OWCP denied appellant's claim for compensation as the medical evidence did not establish employment-related disability for the period in question.

On November 20, 2014 appellant requested a telephone hearing. During the telephone hearing, held on May 20, 2015, she advised that beginning September 23, 2014 the employing establishment sent her to another office and did not provide her with work for a full day. Counsel argued that the position upon which OWCP based the loss of wage-earning capacity determination was makeshift in nature. He specified that she claimed compensation for lost hours during four pay periods, or eight weeks of work.

By decision dated June 26, 2015, an OWCP hearing representative affirmed the November 18, 2014 decision as modified to show that appellant was entitled to wage-loss compensation for lost time from September 23 to October 31, 2014 as the employing establishment did not provide her with eight hours of work. He affirmed, however, the August 28, 2013 loss of wage-earning capacity determination after finding that there was no evidence the original rating was in error or that she experienced a material change in her accepted condition.

### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.<sup>3</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>4</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.<sup>5</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>6</sup>

When a formal loss of wage-earning capacity is in place and light duty is withdrawn, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether OWCP should modify its decision according to the established criteria for modifying a formal loss of wage-earning capacity determination.<sup>7</sup> OWCP procedures provide that when the employing establishment has withdrawn a light-duty assignment, which accommodated the

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<sup>3</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>4</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>5</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>6</sup> *Id.*

<sup>7</sup> See *K.R.*, Docket No. 09-415 (issued February 24, 2010).

claimant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.<sup>8</sup>

In addition, it is well established that a position that is considered an odd-lot or makeshift position designed for a claimant's particular needs is not appropriate for a wage-earning capacity determination.<sup>9</sup> The Board has discussed several factors that may support a finding that the offered position was makeshift in nature. These factors include: (1) the position did not have an official title or formal position description; (2) there were strict limitations, such as five-pound lifting and no casing of mail, which indicated that the claimant would not be able to secure a position in the community-at-large with such limited duties; (3) the claimant did not perform any meaningful tasks in the position; and (4) the job appeared to be temporary in nature.<sup>10</sup> OWCP's procedures provide that the offered position must correlate to the type of appointment held by the injured employee at the time of injury. Reemployment may not be the basis of a wage-earning capacity determination when the job is temporary where the employee's job when injured was permanent.<sup>11</sup>

### ANALYSIS

OWCP accepted that appellant sustained a temporary aggravation of a sequestered lumbar disc fragment and a temporary aggravation of nerve impingement due to a disc extrusion under file number xxxxxx336. She had previously sustained an aggravation of a lumbar disc extrusion and displacement of an intervertebral disc under file number xxxxxx990. On September 10, 2009 appellant experienced an exacerbation of nerve impingement and a sequestered lumbar disc fragment, assigned file number xxxxxx834. OWCP combined all claims under file number xxxxxx990.

On March 22, 2012 appellant underwent a spinal fusion at L4 to S1, which OWCP authorized under file number xxxxxx834. Under that file number, by decision dated August 28, 2013, OWCP reduced her compensation to zero effective May 20, 2013 after finding that her actual earnings as a complaint and inquiry clerk fairly and reasonably represented her wage-earning capacity. Appellant filed claims for compensation from September 20 to October 31, 2014 alleging that the employing establishment did not provide her with full-time employment during this period. In a decision dated June 26, 2015, an OWCP hearing representative determined that she was entitled to compensation for the periods of partial disability claimed from September 23 to October 31, 2014. He found, however, that appellant had not established modification of the August 28, 2013 loss of wage-earning capacity determination.

Appellant did not argue that she sustained a material change in the nature and extent of her employment-related condition. Instead, counsel contended at the hearing that the loss of wage-earning capacity determination was erroneous as it was based on a makeshift position.

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6(a)(5) (June 2013).

<sup>9</sup> See *A.J.*, Docket No. 10-619 (issued June 29, 2010).

<sup>10</sup> *Id.*

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5.2(d) (June 2013); see also *M.I.*, Docket No. 14-1784 (issued August 21, 2015).

OWCP based its August 28, 2013 loss of wage-earning capacity determination on the position offered appellant in May 2013 by the employing establishment of complaint and inquiry clerk. The employing establishment specified, however, in the job offer that the position was available from May 20 through September 29, 2013. When determining whether earnings in alternative employment fairly and reasonably represent the employee's wage-earning capacity, OWCP may not consider the work appropriate when the job is temporary and the employee's previously held job was permanent.<sup>12</sup> On June 5, 2013 the employing establishment informed OWCP by e-mail that the position was an open-ended, temporary detail that may last indefinitely. In a telephone call dated August 26, 2013, it advised that the position was not temporary but a rehabilitation position. There is no evidence, however, that the May 10, 2013 offered position was formally classified as a permanent position.<sup>13</sup> As a result, the Board finds that appellant has met her burden of proof to establish that the original August 28, 2013 loss of wage-earning capacity determination, issued under file number xxxxxx834, was in error.

### **CONCLUSION**

The Board finds that appellant has met her burden of proof to establish that the August 28, 2013 loss of wage-earning capacity determination should be modified.

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<sup>12</sup> *Id.*; see also *J.D.*, Docket No. 12-1026 (issued October 18, 2012).

<sup>13</sup> See *M.I.*, *supra* note 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 26, 2015 decision of the Office of Workers' Compensation Programs is reversed as to modification of the loss of wage-earning capacity determination.

Issued: April 5, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board